86 1976

Supreme Court, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

IN THE MATTER OF
FLORENCE ANNE BRIGGS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF INDIANA

FLORENCE ANNE BRIGGS
P.O. Box 2
Flora, IN 46929
(219) 967-3630

Pro Se

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

IN THE MATTER OF
FLORENCE ANNE BRIGGS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF INDIANA

FLORENCE ANNE BRIGGS
P.O. Box 2
Flora, IN 46929
(219) 967-3630

Pro Se

QUESTIONS PRESENTED

(1) WHETHER A STATE CONSISTENT WITH THE 5TH, 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION MAY REQUIRE TWO SEPARATE DISCIPLINARY ACTIONS INVOLVING SEPARATE ISSUES AND CLAIMS TO BE TRIED TOGETHER UNDER THE GUISE OF JUDICIAL ECONOMY SIMPLY BECAUSE THE RESPONDENTS ARE SPOUSES AND PARTNERS IN THE SAME LAW FIRM.

(2) WHETHER IT IS FUNDAMENTALLY UNFAIR SO AS TO OFFEND THE DUE PROCESS CLAUSE OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION TO DISCIPLINE AN ATTORNEY BY INFUSING THE ACTS OF ANOTHER ATTORNEY ON HER SIMPLY BECAUSE OF HER MARITAL RELATIONSHIP WITH THAT ATTORNEY.

(3) WHETHER A STATE MAY DISCIPLINE AN ATTORNEY FOR GIVING PRUDENT LEGAL ADVICE TO HER CLIENT BY PRESUMING SUCH ADVICE TO BE TAINTED WITH INFIRMITY SIMPLY

BECAUSE THE CLIENT IS HER HUSBAND, CONSISTENT WITH DUE PROCESS, EQUAL PROTECTION AND THE FREE SPEECH GUARANTEES OF THE UNITED STATES CONSTITUTION.

(4) WHETHER IT IS FUNDAMENTALLY UNFAIR TO HOLD DISCIPLINARY PROCEEDINGS OVER THE HEADS OF LAWYER-SPOUSES FOR ALMOST TEN YEARS BEFORE MAKING A JUDGEMENT.

(5) WHETHER A STATE MAY DISREGARD ITS OWN PROCEDURAL RULES WHEN SEEKING TO DISCIPLINE AN ATTORNEY WITHOUT VIOLATING PROCEDURAL DUE PROCESS MANDATED BY THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(6) WHETHER A LAWYER'S RIGHT AND RESPONSIBILITY OF ZEALOUS ADVOCACY IS PROTECTED SPEECH UNDER AMENDMENTS 1 AND 14 TO THE UNITED STATES CONSTITUTION REGARDLESS OF THE NAME OF THE CLIENT.

(7) WHETHER INDIANA DISCIPLINARY PROCEDURES AS APPLIED ARE SO FUNDAMENTALLY UNFAIR AS TO VIOLATE DUE PROCESS.

(8) WHETHER INDIANA DISCIPLINARY PROCEDURE WHEREBY THE SAME ARM OF THE STATE NOT ONLY PROSECUTES BUT ALSO HEARS THE CASE, FINDS THE FACTS, REVIEWS THE CASE, AND ASSESSES COSTS ON UNSUCESSFUL ATTORNEYS, IS CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION.

LIST OF PARTIES

The Parties below are:

Florence Anne Briggs, Petitioner here, Respondent below.

The Disciplinary Commission of the Supreme Court of the State of Indiana, as an arm of said Court.

Copies of this Petition for Writ of Certiorari are being sent to the State of Indiana by its Attorney General, Linley Pearson.

A Complaint for Misconduct was filed by the Disciplinary Commission of the Indiana Supreme Court against Florence Anne Briggs, resulting in the suspension of her license to practice law.

TABLE OF CONTENTS

PAGE

Questions Presented.....i

List of Parties.....iii

Opinions Below.....1

Jurisdiction.....1

Constitutional and Statutory Provisions..2

Statement.....5

Reasons for Granting the Writ.....9

I. Whether is improper under the applicable rules of criminal procedure and the due process clause of the 5th Amendment to require two attorneys charged with different disciplinary violations involving different issues and problems to be tried jointly in a single trial when prejudice will result to one attorney's defense therefrom.....9

(a) Summary of the Issue.....9
(b) Although disciplinary proceedings are quasi-criminal in nature substantial due process should be afforded because an attorney may be deprived of her very livelihood.....11
(c) A State by forcing an attorney to be tried jointly with another attorney charged with separate and more

numerous disciplinary violations, unfairly prejudices that attorney's defense and violates the due process clause of the 5th and 14th Amendments....12

II. Whether the State violates due process and equal protection by prosecuting a person as a spouse rather than attorney such that the taint against husband/attorney rubs off on wife/attorney.....27

(a) State prosecuted Respondent as a spouse and package deal with her husband.....27

III. Whether it is fundamentally unfair to hold disciplinary proceedings of lawyer-spouses for almost 10 years before making a judgment.....35

(a) Bringing stale charges denied attorney a fair trial because of witness' death.....35

(b) Lapse of time in filing of charges until death of witness denied attorney a fair trial.....37

IV. Whether Indiana Disciplinary procedures employed in this and other cases are so fundamentally unfair as to violate due process.....41

(a) The Constitution and Anglo-American notions

of fair play and substantial justice demand due process.....41

(b) The disciplinary procedure is incestuous.....43

(c) The Disciplinary Commission failed to follow its own rules.....44

(d) The Executive Secretary did not notify the attorney of permission to appear before the Disciplinary Commission.....47

(e) Attorney was denied the right to see her own file..49

(f) Executive Secretary was not required to produce his report.....49

(g) Subpoenas of witnesses were quashed.....51

(h) Due process violations can be individual or cumulative.....51

V. Whether a wife-attorney's right and responsibility of zealous advocacy of her husband-client is protected speech under Amendment 1.....52

VI. Whether a decision by the State to assess costs against disciplined attorneys is consistent with due process when the State prosecutes the action and is a beneficiary of the proceeds obtained therefrom.....54

Conclusion.....60

APPENDIX (Separate Volume)

Appendix A Constitution and statutory provisions involved.....A-1

Appendix B Judgment of Indiana Supreme Court dated January 13, 1987.....B-1

Appendix C Hearing Officer's Report....C-1

Appendix D Presentation of Constitutional Issues and Errors - Petition for Hearing, Oral Argument, and Order of Determination.....D-1

Appendix E.....E-1

Petition for temporary stay.....E-1
Order denying petition for temporary stay.....E-9
Petition for modification of Court's decision.....E-11
Order denying Respondent's petition for Modification.....E-16

Appendix F Petition for Review.....F-1

Appendix G Motion for Bifurcated (separate) Hearing.....G-1

Appendix H Motion to Dismiss supplementing special defense #3.....H-1

Appendix I Relevant paragraphs of Complaint filed July 19, 1983.....I

Appendix J Petition for change of Hearing Officer.....J-1

Appendix K Exhibit A-31.....K-1

TABLE OF AUTHORITIES

	Page
Am. Bar Assn. Committee on Professional Ethics, Formal Opinion 340, 61 ABAJ 1542 (1975)	30
A Mississippi Attorney v. The Mississippi State Bar, Superior Court of Mississippi, Misc. #169	42
Baird v. State Bar of Arizona, 91 S.Ct. 702 (1971)	53
Blake v. N. Shore Multipl. Listing Service, Inc., 367 NYS2d 440, 447, 81 Misc. 2d 793	45
Burkett v. Crulo Trucking Company, 355 N.E.2d 253, (Indiana 1976)	14
Caldwell v. State of California, 531 P 2d 785 (Ca. 1975)	37
Cantwell v. Connecticut, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940)	53
7A CJS Sec. 100, pp.49 & 50	29
7A CJS p. 113	2

Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 32

Erdmann v. Stevens, 458 F 2d 1205 (U.S.C.A. 2d Cir. 1972) 11

Federal Rules of Criminal Procedure

Rule 8(a) 16
Rule 8(b) 16
Rule 14 19

Florida Bar v. Wagner, 175 So.2d 33 (Fla. 1965) 50

Gibson v. Berryhill, 411 U.S. 564, 366 L.Ed.2d 488, 93 S.Ct. 1689 (1973) 58

Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 468, 86 L.Ed. 680 (1942) 20

Griswold v. Connecticut, 381 U.S. 749, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965) 34

Indiana Constitution

Article 7 Sec. 4 3

Indiana Disciplinary Rules

AD 23 Sec. 6(a) 3
AD 23 Sec. 9(b) 4
AD 23 Sec. 10 3,4
AD 23 Sec. 10(b) (c) 4
AD Sec. 10(d) 4
AD 23 Sec. 13(a) 4
AD 23 Sec. 14(f) 4
AD 23 Sec. 15(a) 5
AD 23 Sec. 16 5

Indiana Rules

AP Rule 4, Indiana Rules 3

In re Bithoney, 486 F 2d 319, 323 12

In re Ming, 469 F 2d 1352 (7th Cir. 1972) 12

In re Ruffalo, 340 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) 11

In the Matter of Abrams, an Attorney-at-law, 521 F. 2d 1094, 1104 45

In the Matter of Florence Anne Briggs, 502 N.E.2d 890-1 2

In the Matter of Edward L. Fleischer et al., N.J. Superior court, September Term 1985, #D 11/12/13 the dissent by Justice O'Hern 45

Kotteakos v. United States, 328 U.S. 750, 744, 773, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946) 15

Law Students Civil Rts. Res. Coun, Inc. v. Wadmond, 401 U.S. 154, 91 S.Ct. 720 (1971) 12

McGregor v. State, 483 S.W. 2d 559 (Tex 1972) 50

Netterville v. Mississippi State Bar, 397 So.2d 878 (1981) 42

Opper v. United States, 348 U.S. 84, 95, 75 S.Ct. 158, 99 L.Ed. 101 (1954) 20

Re Ratner, 399 P 2d 856 (Kansas 1965) 37

Schaffer v. United States, 362 U.S. 511, 516, 80 S.Ct. 945, 948, 4 L.Ed.2d 921 (1960) 22

Steadman vs. S.E.C., 603 F 1126, 1138 (5th Cir. 1979) 12

Thornton v. Breland, 441 So.2d 1348 (Miss. 1983) 34,53

Theard v. U.S., 77 S.Ct. 1274, 354 US 278, 1 L.Ed.2d 1342 (1957) 2

United States Constitution

1st Amendment 3, 32, 52
5th Amendment 3, 32
9th Amendment 3, 34
14th Amendment 3, 32, 52

United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966) 21, 22

U.S. v. Leon, 104 S.Ct. 3405, 3422, 82 L.Ed.2d 677, 699 (1984) 51

United States v. Mardian, 546 F.2d 973, 977 (D.C. Cir. 1976) 20

United States v. Rosell, 432 F.2d 879, 898 (9th Cir. 1970) 16

United States v. Satterfield, 548 F.2d 1341, 1346 (9th Cir. 1977) 15

Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972) 57, 58

Willner v. Committee on Character and Fitness, 373 U.S. 98, 83 S.Ct. 1175 (1963) 45

Wurm v. Haessly, 360 N.E. 2d 12, (1977) 28

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

NO.

IN THE MATTER OF
FLORENCE ANNE BRIGGS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

Florence Anne Briggs, pro se petitions for a writ of certiorari to review the judgement of the Supreme Court of the State of Indiana.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana (App.B, infra) is reported at 502 N.E.2d 890. The report of the hearing officer (App.C, infra) is not reported.

JURISDICTION

The judgment of the Indiana Supreme Court (App.B, infra) was entered on January 13, 1987. A petition for temporary stay (App.E, infra) was denied

on February 12, 1987. A petition for modification (to reduce suspension time and/or to have suspensions served sequentially not concurrently) (App.E, infra) was denied on February 25, 1987. On April 6, 1987, Justice John Paul Stevens extended the time within which to file a petition for a writ of certiorari to June 12, 1987. The jurisdiction of this Court is invoked under 28 USC Sec. 1257 (3).

Review of constitutional rights in a disciplinary proceeding is by direct appeal to the United States Supreme Court. Theard v. U.S., 77 S.Ct. 1274, 354 US 278, 1 L.Ed.2d 1342 (1957); 7A CJS 113.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Amendments to the United States Constitution provide in relevant part:

1st Amendment: Congress shall make no law...abridging the freedom of speech....

5th Amendment: No person shall...be deprived of life, liberty or property, without due process of law....

9th Amendment: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

14th Amendment: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 7 Sec. 4, Indiana Constitution: The Supreme Court has original jurisdiction in law admission; discipline or disbarment of those admitted.

AP Rule 4(1), Indiana Rules: The Indiana Supreme Court has jurisdiction to assess discipline.

Indiana disciplinary rule AD 23 provides in relevant part:

> (a) Sec. 6(a): The Disciplinary Commission is appointed by the Supreme Court of Indiana.
>
> (b) Sec. 10: The Commission appoints the Executive Secretary with the approval of the Indiana Supreme Court.

(c) Sec. 9(b): The Executive Secretary appoints the staff.

(d) Sec. 10: When a grievance is filed which raises a substantial question of misconduct the Executive Secretary sends a copy of same to attorney who has 20 days to answer same.

(e) Sec. 10(b)(c): After notice to the Lawyer-Respondent, preliminary investigation and response from Respondent, the cause is docketed, investigated and a report is made to the Commission.

(f) Sec. 10(d): In the event that charges of misconduct are not contained in the grievance, the Executive Secretary shall notify the Respondent who shall have an additional 20 days to respond.

(g) Sec. 13(a): After a Complaint is filed, the Supreme Court of Indiana appoints a hearing officer.

(h) Sec. 13: The Hearing Officer shall conduct a hearing on a complaint of misconduct within 60 days after he is appointed and has qualified.

(i) Sec. 14(f): The Hearing Officer submits findings of facts and written recommendations to the Indiana Supreme Court.

(j) Sec. 15(a): The Supreme Court examines the report of the Hearing Officer and enters judgment.

(k) Sec. 16: The Executive Secretary prepares a statement of expenses allocable to each case which Respondent is ordered to pay.

STATEMENT

In October of 1978 a Disciplinary Complaint was filed against William J. Briggs (W.J. Briggs) spouse of Florence Anne Briggs (F.A. Briggs), following the filing of a grievance against both spouses in July 1977. (The grievance against F.A. Briggs was found to be without merit). The Complaint lay dormant until July 19, 1983, when it was escalated and amended and on that very same date a Disciplinary Complaint was filed against F.A. Briggs based, in large part, on the Complaint against W.J. Briggs. In the Complaint against her, F.A. Briggs was referred to as "wife," "spouse" and "law partner" of

W.J. Briggs.

The Complaint against F.A. Briggs followed a grievance filed in May of 1981 and was authorized by the Commission for filing in September of 1982, but was not filed until July 19, 1983, and hearing was held in July of 1984 in a forced joint trial with her husband.

The grievances and complaints against the spouses were all related to circumstances surrounding W.J. Briggs representation of an elderly client and were the only ones filed against the parties since their respective admissions to practice law in 1954 and 1958.

A single hearing on both complaints was required over the objections of both parties.*

---

* (a) A Petition of Change of (Joint) Hearing Officer was filed 9/19/83; denied 10/6/83. (App.J, infra)

(b) Motion for Bifurcated (Separate) Hearing was filed 12/7/83; denied. (App.G, infra)

(c) Motion to Separate for Trial, Motion for Jury Trial filed 7/5/84; denied 7/6/84.

(d) Presented as due process and equal protection violation. (App.C,-67 infra) denied 6/4/84.

(e) Moved to strike from complaint all materials not identical to materials contained in complaint against W.J. Briggs 7/12/84.

(f) Renewed Motion for separate trial (this was during course of trial), motion denied, 7/18/84.

The Hearing Officer's reports were issued on the same day, January 19, 1985, and the judgments of the Indiana Supreme Court were rendered on January 13, 1987. Thus the Briggs family had been held to answer to disciplinary proceedings in one form or another from July 1977 through January 1987, almost ten (10) years. During this time the parties remained in practice with no other complaints or grievances being filed.

The Hearing Officer found that F.A. Briggs had a record of serving the legal profession well, that the charges against her grew out of an isolated incident and that no further significant risk of misconduct existed. He recommended a public reprimand for her and a six (6) months suspension for her husband. Without increasing the Hearing Officer's findings of misconduct against her, the Indiana Supreme Court, without stated reasons, summarily increased her punishment to not less than one year suspension. W.J. Briggs was suspended for two years -- both beginning on February 16, 1987. The joint suspension harshly and effectively closed the door on almost 29 years of law practice and left the Briggs family without means of support or sustenance.

Other background is in the report of the Hearing Officer and judgment of the

court (App.C & B, infra). For clarity, additional facts are stated with discussion of the issues.

REASONS FOR GRANTING THE WRIT

I. WHETHER IT IS IMPROPER, UNDER THE APPLICABLE RULES OF CRIMINAL PROCEDURE AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, TO REQUIRE TWO ATTORNEYS, CHARGED WITH DIFFERENT DISCIPLINARY VIOLATIONS INVOLVING DIFFERENT ISSUES AND PROBLEMS TO BE TRIED JOINTLY IN A SINGLE TRIAL WHEN PREJUDICE WILL RESULT TO ONE ATTORNEY'S DEFENSE THEREFROM.

A. Summary of the Issue.

This issue briefly touches the question of which rules of procedure are applicable to attorneys in disciplinary proceedings and, hence, when joinder and severance of disciplinary actions is appropriate. At present, States appear unrestrained in their ability to force attorneys, charged with separate and distinct disciplinary violations, to try their cases together even though prejudice will result, simply because the attorneys are husband and wife in a single law

firm. Petitioner contends that she has been charged and brought to trial simply because she is the wife of an attorney which the State of Indiana sought to discipline. The State has treated her case as a "package deal" (App.C - 101, infra) with her husband and has afforded her no individual rights which she would have received had her last name not been that of her husband's. This issue appears to be one of first impression and tests what rules constrain a State when prosecuting an individual as attorney-spouse rather than attorney-advocate. This Court should now grant Certiorari to define what rules govern disciplinary proceedings involving husband and wife so that others in petitioner's position will not be stripped of their individual rights when seeking to preserve their attorney status.

B. Although Disciplinary Proceedings are Quasi-Criminal in Nature, Substantial Due Process Should Be Afforded During These Proceedings Because an Attorney May be Deprived of Her Very Livelihood

Although disciplinary procedures are termed quasi-criminal, (In re Ruffalo, 340 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).) high stakes are involved and substantial criminal protections should be afforded.

Disciplinary proceedings threaten serious punishment - loss of professional reputation. This stigma can harm the lawyer in his community and client relations as well as adversely affect his ability to carry out his professional functions - particularly if his branch of law is trial practice. Erdmann v. Stevens, 458 F.2d 1205 (U.S.C.A 2d Cir. 1972).

(F.A. Briggs is a trial lawyer. (App.C - 24, infra)

Because disbarment means deprivation of livelihood (Steadman v. S.E.C., 603 F.2d 1126, 1138 (5th Cir. 1979) lawyers must be afforded substantial due process of law. (In re Ming, 469 F.2d 1352 (7th Cir. 1972).

The test that must be employed as to the constitutionality of disciplinary procedure must be a very severe one (In re Bithoney, 486 F.2d 319, 323 (1st Cir. 1973) and court should use the strictest possible due process standards for the procedures used to carry out necessary bar discipline, Id.; also, Law Students Civil Rts. Res. Coun., Inc. v. Wadmond 401 U.S. 154, 174, 91 S.Ct. 720 (1971).

C. A State, by Forcing an Attorney to be Tried Jointly with Another Attorney Charged with Separate and More Numerous Disciplinary Violations, Unfairly Prejudices that Attorney's Defense and Violates the Due Process Clause of the 5th and 14th Amendments.

When two attorney disciplinary cases are joined for trial so as to prejudice either or both attorneys, courts should be required to separate the cases for trial to promote the ends of justice. Although, at present, it is unclear which body of law controls disciplinary proceedings, whether viewed from the perspective of the applicable rules of criminal procedure or under the Due Process Clause, a severance is required to avoid prejudice and when the rights of one of the parties is diluted. Petitioner contends that by being forced by the State to try her disciplinary case in the same trial with her husband, her case was infused with the alleged impropriety of her husband's conduct which greatly prejudiced her ability to present her defense. Petitioner requests this Court to grant Certiorari in order to define disciplinary procedure and to restrain States from

disciplining multiple persons, as husband and wife, rather than as individual attorneys. The improper joinder of petitioner's case with that of her husband justifies a reversal of the Indiana Supreme Court's imposition of sanctions on her, or, in the alternative, a remand to the trial court for a proper hearing on only the issues that relate to her.

It is proper to grant separate trials when participation in a joint trial tends, either by choice or design, to obfuscate the issues existing and to dilute the procedural rights of the other respondent. Burkett v. Crulo Trucking Company, 355 N.E.2d 253, (Indiana 1976).

With respect to joint trials, it has been noted:

> At a joint trial, where one defendant is charged with offenses in which the other defendants did not participate, the detailed evidence introduced to establish guilt of the separate offenses may shift the

> focus of the trial to the crimes of the single defendant. In such cases, codefendants run a high risk of being found guilty merely by association. United States v. Satterfield, 548 F.2d 1341, 1346 (9th Cir. 1977). (emphasis added).

This Court has also noted that with respect to joint trials of multiple defendants, the "dangers of transference of guilt" are such that a court should use "every safeguard to individualize each defendant in his relation to the mass." Kotteakos v. United States, 328 U.S. 750, 744, 773, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946). Transference of guilt is much more likely in a case where husband and wife are tried together. The potential and actual "transference of guilt" from petitioner's husband to petitioner in the joint trial at issue can be seen from an examination of the record. To facilitate ease of discussion as applicable law, petitioner has set

forth facts from the record at the end of this section.

From the perspective of criminal procedure, Rule 8(b) of the Federal Rules of Criminal Procedure allows multiple defendants to be joined in trial in certain specified situations.* Discussing this rule, the 9th Circuit has noted, "[c]harges against multiple defendants may not be joined [under Rule 8(b)] merely because they are similar in character." United States v. Rosell, 432 F.2d 879, 898 (9th Cir. 1970) (citations omitted). Rule 8(a) requires that the defendants have participated in the same act(s) or transaction(s) constituting the offense.

---

* "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

The record demonstrates that it was not the same acts or transactions of Petitioner and her husband that led to their alleged respective disciplinary violations. F.A. Briggs' husband was charged with violating disciplinary rules by writing an improper will for his client, being a co-owner of a joint C.D. and harassing his client. F.A. Briggs was not involved in this alleged conduct at all. F.A. Briggs was charged with five (5) violations and W.J. Briggs was charged with eight (8). Three (3) were the same and therefore five (5) charges against W.J. Briggs were not charged against F.A. Briggs. Although F.A. Briggs and her husband were both charged with delay in the termination of a guardianship, it was her husband, not F.A. Briggs, who was guardian for the client. (App.C- 7, infra). This charge was totally based on the State's co-mingling of issues which is

demonstrated by the state charging Petitioner as "wife", "spouse" and "law partner." (App.I, infra)

Because a large bulk of husband's case involved transactions in which she had no involvment, the State erroneously joined these cases causing extreme prejudice to Petitioner's case.

Even if it is determined that Petitioner's case and her husband's case were properly joined initially, the prejudice which became apparent to the court required that the court grant a severance of trial to the Petitioner. By rejecting separate trials the State allowed her husband's alleged improper conduct to "rub off" on Petitioner to her detriment, and ultimately, improperly resulted in her being sanctioned for conduct that was not her own. The ethical violations, if any, of husband became cloaked around the shoulders of wife like

the Biblical "sins of the fathers." These actions by the State violated the Rules of Criminal Procedure and Petitioner's due process rights, and justify a reversal of the Indiana Supreme Court's decision to impose sanctions on Petitioner.

Rule 14 of the Federal Rules of Criminal Procedure states that "[i]f it appears that a defendant is prejudiced by a joinder...of defendants...for trial together, the court may order...separate trials of courts, grant a severance of defendants or provide whatever other relief justice requires." Rule 14, Fed.R.Crim.Proc. (emphasis added). While the record amply supports the court's recognition of potential prejudice by joining Petitioner's case with her husband's case, numerous attempts by Petitioner to seek a separate trial were rejected and the court afforded Petitioner no relief at all.

Petitioner concedes that a motion to sever is addressed to the discretion of the trial court, Opper v. United States, 348 U.S. 84, 95, 75 S.Ct. 158, 99 L.Ed. 101 (1954), however, this Court has recognized that when joining cases for trial, "the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant." Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 468, 86 L.Ed. 680 (1942). "Every safeguard to individualize each defendant in his relation to the mass" should be employed since "the danger , persists that the guilt will improperly 'rub off' on the others." United States v. Mardian, 546 F.2d 973, 977 (D.C. Cir. 1976).

It has been noted that "severance is among the most important safeguards available to minimize the risk of

prejudice." Id. (citing United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), cert denied, 384 U.S. 947 (1966).). The District of Columbia Circuit accepts the rule that severance is required when evidence against one or more defendants is "far more damaging" than the evidence against the moving party. See Mardian, 546 F.2d at 977.

The evidence against her husband on execution of the will, the joint C.D., the harassment was "far more damaging" than the evidence against Petitioner. That prejudice to Petitioner existed can be seen in the Hearing Officer's own statements:

> In all candor it is impossible to always provide the source of much of the background information....(App.C - 94, infra)

The Hearing Officer at the outset of the joint trial recognized the "possibility of conflict" (App.C - 84,

infra) between the cases of the two parties. This, itself, decreed separation of causes.

Further, "[i]t is well settled that the trial judge is under 'a continuing duty at all stages of the trial to grant a severance if prejudice' to a particular defendant is made manifest." Kelly, 349 F.2d at 759 (citing Schaffer v. United States, 362 U.S. 511, 516, 80 S.Ct. 945, 948, 4 L.Ed.2d 921 (1960) (emphasis added).). A strong example of the prejudice to Petitioner is the fact that during one stage in the trial Petitioner wished to call a witness to refute the State's accusation against her but was forced not to because her husband (co-defendant) felt such testimony would be damaging to his case.

> Respondent and Co-Respondent indicated at two or three different stages of trial that they had held spirited discussions as to their

> appropriate course of action and that they were not in agreement as to what it should be. The only specific evidence on the topic was that one of them wanted to call two witnesses, the other didn't.... (App.C - 87, infra)

Because the cases were joined, Petitioner was placed in a position of having to choose between her own best interest (calling the witness) and the best interest of her family members (not calling the witness). Petitioner was charged with delay in a matter, and the witness was a judge who had previously stated that he, not Petitioner, was responsible for this delay. The statement was transcribed by the Court Reporter, certified and offered into evidence (Trial Exhibit A-31, App.K, infra) by F.A. Briggs in an effort to resuscitate her defense. Because the statement was hearsay the Petitioner was unable to present this evidence to the court without the witness

taking the stand. The harm is that F.A. Briggs was found guilty of the very delay the court took upon himself. Joinder of trials precluded Petitioner from presenting this testimony and she was convicted of this "delay" charge. Since the hearing officer had notice of this prejudice he had the duty at this stage of the trial to grant a severance. Kelly; Id. This prejudice supports reversal of the Indiana Supreme Court judgment against her.

In order to understand other prejudice which had to be endured by husband and wife being tried together, some background facts are necessary.

(a) The Judge on the February - May 1977 case Robert Munro, rendered an opinion with reference to W.J. Briggs which is quoted in the disciplinary proceedings of F.A. Briggs. (App.C - 33, infra):

> This Officer would be hard pressed to improve upon the observation of Judge Munro... In the matter at hand, (Mr. Briggs) treated the entire matter as an adversary proceeding,...

Note that while this finding relates to Mr. Briggs it is used as a basis to find against Mrs. Briggs the co-respondent. Therefore, the judgment is that F.A. Briggs committed an ethical breach as an attorney because of the ruling against her husband-client.

(b) Other examples of co-mingling of the two cases are found in the Hearing Officer's Report on F.A. Briggs as follows: Paragraph 2 refers to W.J. Briggs as a companion case and for roughly eight pages the Hearing Officer discusses matters pertaining almost entirely to W.J. Briggs. In paragraph 10 he even acknowledges that the incidents uniformly involved W.J. Briggs only. (App.C - 2, infra).

(c) Two paragraphs refer to other cases involving W.J. Briggs which do not concern disciplinary issues against F.A. Briggs. (App. C - 50, C - 82, infra).

(d) Paragraph 84 refers to the person as "her client" ('her' being F.A. Briggs) although she was W.J. Briggs' client. (App.C - 107, infra).

(e) Paragraph 11 refers to F.A. Briggs as respondent but clearly means W.J. Briggs. (App.C - 13, infra).

(f) Paragraph 62 states that the evidence undertaken by F.A. Briggs had little or no impact on her case. (App.C - 85, infra) This is a direct result of the joinder which left the parties, judge and counsel, confused as to what evidence had been put in for which respondent and the purposes for which exhibits were admitted.

An example that the parties were treated as one and not as individuals is that on one day of the trial, the Hearing

Officer held an in chambers conference with the Disciplinary attorney and her husband's attorney but did not include her in or notify her of the conference.

II. WHETHER THE STATE VIOLATES DUE PROCESS AND EQUAL PROTECTION BY PROSECUTING A PERSON AS SPOUSE RATHER THAN ATTORNEY SUCH THAT THE TAINT AGAINST HUSBAND/ATTORNEY RUBS OF ON WIFE/ATTORNEY.

a. The State Prosecuted Respondent as a Spouse and Package Deal with Her Husband Rather Than as An Individual Attorney.

It is believed that this is an issue of first impression since it relates to the treatment of an attorney as a spouse-advocate rather than an attorney-advocate. The spousal taint requires some background facts. F.A. Briggs is the attorney-spouse of W.J. Briggs, an attorney, who was drawn into litigation triggered by his client who filed a petition to remove him as her guardian and to appoint a successor guardian couched in language which the Hearing Officer

recognized as defamatory. (App.C - 109, infra). F.A. Briggs, looking at the Petition as an attorney was aware that some allegations were easily disprovable by court records and could have resulted in a finding of perjury and/or misleading of the court against the client's new attorneys. She consulted with Ralph Hanna, a senior and well-respected attorney, who recommended the proper course of action to be to demand strict proof of the allegations. She knew of the February 14, 1977, decision of the Indiana Court of Appeals in Wurm v. Haessly, 360 N.E.2d 12, (1977) that it is improper to terminate a guardianship if the ward is subject to undue inappropriate pressures. It is for her prudent legal advice, which happened to be given to her husband, that discipline has been imposed. Had she made these decisions for a client other than W.J. Briggs, it is submitted that no

discipline would have been imposed but it would have been regarded as advocacy on behalf of the client. The Indiana Supreme Court, determined that F.A. Briggs acted only to preserve her family's interest in the client's estate. Admittedly, the client had included members of Briggs' family in wills dated 1968 and 1970 (before the adoption of the Disciplinary Rules in Indiana) but on February 23, 1977, nine days after the commencement of the litigation, the will was changed, and from that time on, there was no family interest for F.A. Briggs to preserve.

There is a presumption in a disciplinary proceeding that the attorney is innocent of the charges, and performed her duty in accordance with her oath and acted from proper motives. 7A CJS Sec. 100, pp.49 & 50. These presumptions were not applied to F.A. Briggs for it was presumed that she could not be using good

legal judgment, but only that she was blinded by self-interest as a spouse.

While all lawyers are to be treated equally despite marital status, and it should not be presumed that just because lawyers are married they will violate disciplinary rules * this treatment was ignored in the F.A. Briggs case. It was presumed that she could not act independently as an attorney and apart from her husband. She was subordinated to her husband's case and denied equal protection.

---

* Am. Bar Assn. Committee on Professional Ethics, Formal Opinion 340, 61 ABAJ 1542 (1975).

The Complaint (which is part of the record but is not in the appendix) against F.A. Briggs referred to her as a spouse, e.g., Paragraph 1, she "appeared and served as counsel for the conservator, her husband and law partner" and "her husband

and law partner was retained"; Paragraphs 16 and 20 she appeared and served as counsel for her husband and law partner; paragraph 27 refers to her conduct as law partner, spouse. Relevant portions are App.I, infra.

The report of the Hearing Officer excluding constitutional issues findings and recommendations is 54 paragraphs. Paragraph 1 is introductory; five do not refer to either F.A. Briggs or W.J. Briggs; twenty do not refer to F.A. Briggs at all but only to W.J. Briggs. Except for Paragraph 1, it is not until Paragraph 42 that F.A. Briggs is referred to individually as an entity separate from her spouse. Even the recommendations of the Hearing Officer at Paragraph 43 refer to "love and concern for her husband who was being defamed." (NOTE: Judgment for defamation was entered by another court.)

The fact that husband and wife were required to be tried together in a joint disciplinary proceeding even though many issues were different conveys that F.A. Briggs was being treated as Mrs. rather than as Attorney-Advocate. The equal protection component of the Due Process Clause gives the personal right to be free from gender-based discrimination even where it is not substantially related to achieving an important governmental objective. Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846.

The presumption of wrong-doing by advocate-wife offends the 1st, 5th and 14th Amendments to the U.S. Constitution. There was an oppobrium that attached to F.A. Briggs because she was classified "spouse" rather than "attorney-advocate" in this case.

b. The Judgment, Co-Mingled the Spousal Cases.

The Judgment of the Indiana Supreme Court consists of much background relating to W.J. Briggs, in areas not participated in by F.A. Briggs such as: drafting of will by W.J. Briggs; execution of the Certificate of Deposit; cash farm leases; lock-box incident; client going to another attorney. This set the stage for a finding against F.A. Briggs based on facts relative only to W.J. Briggs. Thus the evidence was polluted and co-mingled.

It is important to note that in the judgment F.A. Briggs is usually referred to as the "assistant" for W.J. Briggs. It is unknown, therefore, whether she is perceived of as an attorney or a spouse. If she is perceived to be acting only as a spouse, then any attempt to discipline her is improper and would be an interference with family integrity which is protected

by the 9th Amendment to the U.S. Constitution. Griswold v. Connecticut, 381 U.S. 749, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965). If she is perceived of as an attorney, then she was making judgment decisions with reference to her client and this is a protected activity under the 1st Amendment to the U.S. Constitution. Thornton v. Breland, 441 So.2d 1348 (Miss. 1983).

Evidence of co-mingling of the facts and issues is illustrated by the judgment that "they" (spouses) believed the guardianship should be terminated. (App.B - 26, infra) This is incorrect since the Hearing Officer's facts recognized that this was not the decision of F.A. Briggs, but of W.J. Briggs since she counseled against the filing of W.J. Briggs' Petition to Terminate. (App.C - 24, infra).

III. WHETHER IT IS FUNDAMENTALLY UNFAIR TO HOLD DISCIPLINARY PROCEEDINGS OVER THE HEADS OF LAWYER-SPOUSES FOR ALMOST TEN YEARS BEFORE MAKING A JUDGMENT.

a. Bringing Stale Charges Denied F.A. Briggs a Fair Trial Because of Witness' Death.

On July 19, 1983, F.A. Briggs was charged with delay of the termination of a guardianship. The Complaint was filed six years after the alleged offense and in this period the only witness who could have testified for her on this charge died. Because delay was not charged in the grievance F.A. Briggs had no notice that this witness' testimony would be needed to defend herself.

A chronology of relevant dates is as follows:

Dates of alleged delay, February-May 1977

Ralph Hanna (the witness) died, March 1981

Complaint filed, July 19, 1983

During the alleged delay period F.A. Briggs sought Ralph Hanna's (an attorney)

advice on how to proceed as to the guardianship at issue. He was acquainted with the client and familiar with the background of the case and advised F.A. Briggs that the attorneys for the ward should be forced to furnish strict proof of their allegations. There were no new facts from 1977 to 1983 to sustain the delay charge, thus, if the charge had been filed anytime before Mr. Hanna's death his deposition could have been taken to preserve his testimony.

Because the disciplinary charges were stale and brought so many years after the alleged offense, she was deprived of the only person who could have disproved that her actions were not taken with her family's interest in mind but were based on sound legal judgment after consultation with independent counsel.

The Hearing Officer found (Para. 61 (h) p. 32) that "Respondent was put on

notice early that this action would result so she had ample opportunity to recall and preserve as much as necessary." This is an erroneous conclusion since F.A. Briggs was not charged until after the death of Mr. Hanna, and then it was not possible to preserve his testimony. Stale prosecutions are not favored and are inequitable. Re Ratner, 399 P.2d 856 (Kansas 1965); Caldwell v. State of California, 531 P.2d 785 (Ca. 1975). The court found against F.A. Briggs on the very charge (delay) she was unable to disprove due to the court's own lack of diligence in prosecuting the charge in a timely fashion. This cause should be reversed.

b. Lapse of Time in the Filing of the Charges Until the Death of Witness Denied F.A. Briggs a Fair Trial.

Other litigation, a will contest, ensued in 1980 and again F.A. Briggs represented the several will-contestors,

one of which was W.J. Briggs. On November 8, 1980, an offer to settle the entire matter for all contestors was conveyed by letter to the attorneys for the residuary devisees, a church and a cemetary. The offer was never conveyed to the residuary devisees.*

---

* The offer was for $29,250.00; fees for the attorneys in the will contest were $65,310.00 thus offering a possible explanation for the estate attorneys' unwillingness to convey the settlement offer.

The trial judge told her that she could explore conveyance of the offer with persons not on decision making boards. Since retired Reverend Arthur Schenck had been in her office recently, she asked him if he were on such board, he said "no" and she asked him to find out if the offer had been conveyed. At the disciplinary hearing, for the first time, she learned that all retired ministers are ex officio members of such boards even though they do

not participate. Since the grievance filed against her in June of 1981 alleged that she had communicated with or caused a person to communicate with the client of another attorney, her then attorney, James Stewart of Indianapolis, made a 130-mile trip to talk with Schenck - in October 1981. Scheck confirmed to Stewart that F.A. Briggs had asked him only to see if the offer had been conveyed. It was not necessary for Schenck to convey the offer...that had already been conveyed to the opposing counsel.

Passage of time and illness took their toll on Stewart. Stewart died in June of 1983. Schenck later contradicted the testimony of F.A. Briggs and W.J. Briggs and the statements he had made to Stewart.

Dates are important. The Briggs meeting with Schenck was November 1980; the meeting between Schenck and Stewart

was October 1981; the Commission authorized the filing of the complaint on this Schenck issue in September 1982; Stewart died in June 1983; the Complaint was filed in July 1983; the hearing was July 1984. Thus, by the time of the filing of the Complaint, Stewart, the only person who could have refuted Schenck's testimony was dead. The Commission had been put on notice by Stewart's reply to the grievances that he had met with Schenck who had confirmed to him that he was only asked to see if the offer had been conveyed. Nevertheless, the Commission chose not to file the Complaint against F.A. Briggs until a month after Stewart's death and over 10 months after it had been authorized. The lapse of time indulged in by the Disciplinary Commission in the filing of the charges cost F.A. Briggs her only rebuttal witness. The harm is that the Indiana Supreme Court

found against F.A. Briggs on this charge.

Certiorari should be granted to determine whether the Disciplinary Commission's deliberate indifference to the rights of the Respondent by bringing charges against her after the death of a witness whom they knew could testify in her behalf violated due process guaranteed by the 14th Amendment to the U.S. Constitution.

IV. WHETHER INDIANA DISCIPLINARY PROCEDURES EMPLOYED IN THIS AND OTHER CASES ARE SO FUNDAMENTALLY UNFAIR AS TO VIOLATE DUE PROCESS.

a. The Constitution and Anglo-American Notions of Fair Play and Substantial Justice Demand Due Process.

Some due process violations do not, in and of themselves, rise to the level of seriousness to mandate dismissal or remand of this case. However, cumulatively, they evince an attitude of deliberate indifference on the part of the State toward attorneys' due process rights.

This treatment relegates the attorney to a second class citizen and creates two classes of individuals....non-lawyers who are secure that they are entitled to due process and lawyers who are given only a watered-down version of constitutional-due process rights.

Due process of law is demanded by the 5th and 14th Amendments to the U.S. Constitution and also by traditional Anglo-American notions of fair play and substantial justice. Netterville v. Mississippi State Bar, 397 So.2d 878 (1981) cited in A Mississippi Attorney v. the Mississippi State Bar, Superior court of Mississippi, Misc. #169. A lawyer is trained from her first day in law school to look to the procedure to defend clients, to demand that procedure be followed not to offend due process. It violates fair play to tell the lawyer that because she is an attorney she can be

denied procedural due process by the Disciplinary Commission who has no fear of reprisal for this denial.

b. The Disciplinary Procedure is Incestuous.

In Indiana, since there is no State machinery to appeal a disciplinary decision, the judgment of Court is usually final. (This attorney has found no disciplinary case in Indiana which has been granted certiorari by the U.S. Supreme Court). The Supreme Court of Indiana is the court of last resort in that State. This very Court appoints the Disciplinary Commission, approves the choice of Executive Secretary, appoints the Hearing Officer and makes the final determination of bar discipline. (App.A, infra). This is an incestuous relationship. It is unlikely that an attorney requesting sanctions for due process violations by the Commission, or

its Executive Secretary will be successful; it would be tantamount to the Court cutting off its own arm. In determining that due process in Indiana includes only notice of the charges and the right to be heard, the Indiana Court has given carte blanche to the Commission to run unchecked over the due process rights of the individual attorney.

c. The Disciplinary Commission Failed to Follow its Own Rules.

F.A. Briggs was found to have violated Disciplinary Rules by delaying the termination of a guardianship from February - May, 1977. This is the harm. Her first notice of this charge was by way of the Complaint filed against her on July 19, 1983 since the grievance which preceded this Complaint did not charge this violation. Under A.D. 23 Sec. 10, (App.A, infra) if a new grievance comes to the attention of the Commission, the

attorney shall be given notice and 20 days to reply before a Complaint is filed. This rule was violated when F.A. Briggs was never given such a notice.

Because of this failure, F.A. Briggs filed a Motion to Dismiss this charge (App.H, infra) but the Motion was denied. The Executive Secretary of the Commission testified at the hearing that due process does not extend to the initial stages of the proceeding. His conclusion conflicts with Willner v. Committee on Character and Fitness, 373 U.S. 98, 83 S.Ct. 1175 (1963) holding that requirements of fairness are not exhausted in taking or consideration of the evidence but they extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

Blake v. N. Shore Multiple Listing Service, Inc., 367 NYS2d 440, 447, 81 Misc.2d 793, states that due process

includes procedural due process, i.e. ways of asserting and conducting disciplinary proceedings fairly and openly with full legal rights and remedies to be used by the party under attack. In the Matter of Edward L. Fleischer et al., N.J. Superior court, September Term 1985, #D 11/12/13 a dissent by Justice O'Hern recognizes that lawyers are entitled to no less fundamental procedural fairness than others facing disciplinary action.

Addressing a similar issue, In the Matter of Abrams, 521 F.2d 1094, 1104 states:

> If the district court chose as was its right...to go beyond the State court proceedings and examine other aspects of Abrams' 'conduct...' it was obliged to follow its own rules. (emphasis added).

Certiorari should be granted to determine if State Disciplinary Commission which fails to follow its own rules during disciplinary proceedings offends the due

process clause. The finding against F.A. Briggs on this issue should be reversed.

d. The Executive Secretary Did Not Notify The Attorney of Permission to Appear Before the Disciplinary Commission.

Although an appearance before the Disciplinary Commission in defense of one's self is not mandated by due process, once permission to appear has been granted, fair play and due process demand that notice be given to the attorney.

F.A. Briggs requested and received permission to appear before the Disciplinary Commission prior to the filing of any Complaint. (App.C - 75, infra). The Executive Secretary did not notify F.A. Briggs of the permission to appear. The first notice the attorney had that she could so appear was at the trial, 25 months after permission to appear had been granted.

At trial the Executive Secretary testified that he had not given the

attorney notice to appear. On July 9, 1982, the Commission held its July meeting and when the uninformed F.A. Briggs did not appear they withdrew their previously given permission. (App.C,infra). It is reasonable to infer that the Commission members thought that she no longer wished to appear. The minutes do not reflect that the Commission members were told that the Executive Secretary had failed to notify F.A. Briggs to appear. At any rate, after the July meeting, the Executive Secretary did take action by way of a letter to F.A. Briggs notifying her that her request to appear at the Commission had been denied. Fair play and due process were violated by these actions.

The harm is that F.A. Briggs lost her chance to personally address the Commission members, to answer questions and most importantly to have with her

attorney Stewart, who could have verified what F.A. Briggs had, in fact, told Schenck. (Discussion supra)

e. F.A. Briggs Was Denied the Right to See Her Own File.

In May 1985, F.A. Briggs went to the Clerk of the Indiana Supreme Court and asked to examine her own file. She wished to verify the filing of a Petition, copy of which had not been sent to her. She was not permitted to see her own file. A written petition to see and examine same shortly thereafter was denied. In denying this right, the court did not find that there was a state interest in denial. Since the files are public record, this is another denial to the attorney of due process rights. There could have been no harm to permit the attorney to see her own file.

f. Executive Secretary Was Not Required To Produce His Report.

A request to examine the report of

the Executive Secretary to the Commission was denied by the Hearing Officer (App.C - 97, infra). In making this ruling the Hearing Officer contravened the rulings of at least two states. Florida Bar v. Wagner, 175 So.2d 33 (Fla. 1965) and McGregor v. State, 483 S.W.2d 559 (Tex. 1972) hold that an attorney was entitled to the report after the filing of the complaint. Because of the method in Indiana of reporting only cases where misconduct is found, it is unknown whether any Respondent in Indiana has seen a copy of his/her report and whether permission for such examination has ever been granted in Indiana. The Hearing Officer stated in the W.J. Briggs findings:

> "In the long term, this may create an imbalance, inviting federal interference on due process grounds."
> (Para. 94, Hearing Officer's Report, attached to W.J. Briggs' Petition for Certiorari)

Certiorari should be granted so that

discovery guidelines in disciplinary proceedings will be uniform through-out the states.

g. Subpoenas of Witness Were Quashed.

The accused attorney deemed it necessary to her defense to have members of the Disciplinary Commission testify at her hearing to determine if the Commission really found reasonable cause against her to file the charges, if a fair presentation had been made to the Commission or if they acted as a "rubber stamp" which would tend to violate exception #2 of U.S. v. Leon, 104 S.Ct. 3405, 3422, 82 L.Ed.2d 677, 699 (1984). The subpoenas were quashed and, therefore, the attorney was denied the opportunity to present additional constitutional issues in defense of this case.

h. Due Process Violations Can Be Individual or Cumulative.

All of the due process violations

listed above cumulatively rise to constitutional dimension and dictate that this cause should be dismissed or remanded for an action consistent with due process.

Certiorari should be granted so that a guideline can be established for all lawyers subject to bar discipline and for the bar disciplinary bodies of the respective states.

V. WHETHER A WIFE-ATTORNEY'S RIGHT AND RESPONSIBILITY OF ZEALOUS ADVOCACY OF HER HUSBAND-CLIENT IS PROTECTED SPEECH UNDER U.S.C.A. CONSTITUTIONAL AMENDMENT 1.

Advocacy is a right guaranteed by the 1st Amendment and cannot be washed away simply because one is a spouse-attorney.

> "The lawyer's right and responsibility of zealous advocacy, <u>regardless of the name of the client</u>, is protected speech under USCA Constitutional Amendments 1 and 14. The lawyer is prepared to stand against the forces of hell though others see that as his client's just dessert. Advocacy on behalf of the client is among the most precious forms of speech."

Thornton v. Breland, 441 So.2d 1348 (Miss. 1983). (emphasis added).

The 1st Amendment embraces freedom to believe and freedom to act. Cantwell v. Connecticut, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940). These are two freedoms that an attorney must have-regardless of the name of the client. The attorney must believe in her client and her client's cause. Then she must be free to act for the client. Disciplining an attorney for exercising these rights chills the protections afforded to both attorney and client. These rights cannot be punished simply because of the marital relationship between attorney and client. The 1st Amendment also guarantees freedom of mind. Baird v. State Bar of Arizona, 91 S.Ct. 702 (1971). Thus the attorney must know she is free in mind to make judgment decisions for her client and know that she

will not be disciplined for these actions.

Certiorari should be granted to determine if an attorney can be disciplined for advocacy of a client - whether the client is her husband or someone of another name.

Because the disciplining of the attorney for advocacy violates the 1st Amendment protections, the decision should be reversed.

VI. WHETHER A DECISION BY THE STATE TO ASSESS COSTS AGAINST DISCIPLINED ATTORNEYS IS CONSISTENT WITH DUE PROCESS WHEN THE STATE PROSECUTES THE ACTION AND IS A BENEFICIARY OF THE PROCEEDS OBTAINED THEREFROM.

In Indiana, the Disciplinary Commission and staff are arms of the Indiana Supreme Court and also act as the prosecuting power. The Indiana Supreme Court also assesses guilt and punishment in a disciplinary proceeding without any State machinery for appeal. (App.A, infra; App.F - 33, infra).

If guilt is assessed, not only must the Respondent pay court costs but also the expenses of investigation, witnesses and attorneys employed by the Commission. There is a lack of an independent adjudication when guilt fills the coffers of the court's arm. Therefore, the court, consciously or unconsciously, may use this as a factor in assessing guilt. At least it may tip the scales. The Disciplinary Commission and Court are all members of the same family and assessment of guilt by one member generates funds for another member. A not guilty would deplete family funds. Appellant here is referring to meals, hotels, airplane tickets, etc. The attempts of Appellant to determine the costs in advance and ascertainable standards for same were unsuccessful. This whole procedure can lead to abuses.

The plaintiff in a civil suit pays costs based on ascertainable standards

consistent with plaintiffs all over the State of Indiana. The costs assessed in a criminal proceeding are ascertainable, based on rules and statutes. However, the costs of Indiana Disciplinary Proceedings escape any standard of ascertainability and are left to the potentially abusive discretion of Commission members and employees.

The expenses in Disciplinary proceedings are carte blanche and with no governor known to Respondent. Thus, while Respondent may be eating a Big Mac at $1.25, she may be paying for a $10.00 hamburger the Disciplinary Commission Prosecutor is eating across the street.

It does not appear to comport with due process and fundamental fairness for the losing lawyer to have to pay for his own prosecution. This may chill right resulting in some lawyers to plead guilty

merely because of financial considerations.

This situation seems analagous to Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972). Where the court held that a mayor before whom petitioner was compelled to stand trial was also responsible for village finances, and assessed court costs which provided a substantial portion of the village funds, denied trial before an impartial and disinterested judicial officer as guaranteed by the Due Process Clause.

The test reaffirmed in Ward, Id., 83 is whether the situation would offer a temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused. Where one position is partisan

and the other judicial this necessarily involves lack of due process. Ward, 83.

In Gibson v. Berryhill, 411 U.S. 564, 366 L.Ed.2d 488, 93 S.Ct. 1689 (1973) the court found that personal interest of the licensing board disqualified the members from judging on license revocation of another optometrist. It is in no way contended, as in Berryhill, that the Indiana Supreme Court members have a personal pecuniary interest in bar disciplinary proceedings. However, the principle reaffirmed in Berryhill is applicable.

> "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes (citations omitted) ...the financial stake need not be...direct or positive...it has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to...administrative adjudicators." Berryhill at 500.

In a recent case, a Mississippi attorney sought to recover from the Disciplinary Commission his expenses in defense of his case after a finding of no misconduct. The court denied recovery because if it were granted the court assessing discipline might be inclined to find guilt just so expenses would not have to be paid to the winning attorney. the citation to this case is not available but can be furnished at a later time. The same principle would seen to apply to the assessment of prosecutorial expenses on a finding of misconduct as a means of filiing a coffer depleted by the investigation and prosecution. At least there should be ascertainable standards to put the attorney on notice of what expenses he might have to pay.

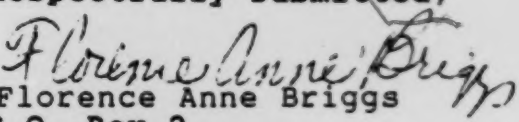
Certiorari should be granted to determine if it violates power in disciplinary cases to assess prosecutorial

expenses for a member of its own family. The judgement of the Indiana Supreme Court should be reversed where it assesses prosecutorial expenses to the respondent.

CONCLUSION

WHEREFORE, Florence Anne Briggs petitions the Court to grant certiorari, reverse the judgment of the Supreme Court of Indiana and for all other relief proper in the premises.

Respectfully Submitted,



Florence Anne Briggs
P.O. Box 2
Flora, IN 46929
(219) 967-3630